

and (2) some extraordinary circumstance stood in his way and prevented timely filing.” *See English v. Tex. Farm Bureau Bus. Corp.*, No. 6:17-CV-00323-ADA, 2019 U.S. Dist. LEXIS 178078, at *7-8 (W.D. Tex. 2019)(citing *Sandoz*, 700 F. App'x at 320 (applying *Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750, 755, 193 L. Ed. 2d 652 (2016) in the FLSA collective action context). "The party who invokes equitable tolling bears the burden of proof." *Teemac*, 298 F.3d at 457.

Plaintiffs fail to meet that burden here and have provided no facts to support their argument equitable tolling applies. Furthermore, Plaintiffs’ acknowledge that their attempt to insert their equitable tolling argument at the notice phase is premature and largely inappropriate absent facts or discovery justifying tolling. *See* [Doc. #25, pg. 6].

There is no justification to send notice to proposed class members that fall outside of the statute of limitations. In a footnote, Plaintiffs claim Defendant’s denial that the FLSA is applicable to the Center or its residents somehow validates Plaintiffs’ request to send a notice to proposed class members whose claims clearly are time-barred. Of course, it does not. Plaintiffs proffer no evidence that Defendant actively misled its residents or prevented them from asserting their rights. Because Plaintiffs cannot prove equitable tolling of the statute of limitations is justified here, the Court should deny Plaintiffs’ request to expand the scope of its proposed class and reject Plaintiffs’ request to send notice of conditional certification to individuals outside of the applicable statute of limitations. In the event this Court chooses to conditionally certify a class, Plaintiffs’ proposed notice should be amended to adhere to the FLSA statute of limitations.

II. **CONCLUSION**

Plaintiffs are not similarly situated to the proposed class. Plaintiff’s Motion for Conditional Certification should accordingly be denied. In the alternative, Defendant requests that the Court

reject Plaintiffs' proposed notice and require the parties to confer and present a joint proposed notice subject to Court approval.

Respectfully submitted this 16th day of June 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served June 16, 2020, with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(b)(1). Any other counsel of record will be served by electronic mail, facsimile transmission and/or first class mail on this same date.

/s/ Roy E. Mathews
Roy E. Mathews